88-1706

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY AND FRVR CORPORATION,

Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION AND INTERSTATE COMMERCE COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

1. Whether the court of appeals erroneously held that the Norris-LaGuardia Act deprives federal courts of jurisdiction to enjoin strikes over line sales that the Interstate Commerce Commission has approved under the Interstate Commerce Act as being in the public interest, where the Interstate Commerce Act vests the Commission with jurisdiction to resolve labor disputes arising from such sales.

LIST OF PARTIES

Petitioner Chicago & North Western Transportation Company is the wholly-owned subsidiary of the Chicago & North Western Corporation. Its subsidiaries and affiliates within the meaning of Rule 28.1 are Iowa Transfer Railway Company, Kansas City Terminal Company, MT Properties, Inc., Peoria & Pekin Union Railway Company, Trailer Train Company, Transportation Data Exchange, Inc., ACE Limited, Railroad Association Insurance, Ltd., Transportation & Railroad Assurance Company, Ltd., TQGroup, and West Parcel Venture.

Petitioner FRVR Corporation is the wholly-owned subsidiary of Itel Rail Corporation. Its subsidiaries and affiliates within the meaning of Rule 28.1 are Itel Corporation, Great American Management Investment Inc., Consolidated Fibres, Inc., Nucorp, Inc., Eagle Industries, Inc., Zell/Merrill Lynch Real Estate Opportunity Partners, Signal Capital Holdings Corporation, Pullman Leasing Company, The Henley Group, Inc., Santa Fe Southern Pacific Corporation, and American President Companies, Ltd.

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No.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY AND FRVR CORPORATION,

Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION AND INTERSTATE COMMERCE COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Chicago & North Western Transportation Company ("C&NW") and FRVR Corporation ("FRVR") respectfully request that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case, which affirmed in part and modified in part the order of the Interstate Commerce Commission ("ICC") in *FRVR Corp., etc.—Petition for Clarification*, ICC Finance Docket No. 31205 (served Jan. 29, 1988).

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 861 F.2d 1082 (8th Cir. 1988). The order denying rehearing (App. 26a) is unreported. The order of the Interstate Commerce Commission (App. 4a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. 24a) was entered on November 21, 1988. A timely petition for rehearing was denied on January 30, 1989. (App. 26a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves §§ 2 First, 5, 6, and 10 of the Railway Labor Act ("RLA"), 45 U.S.C. § 152 First, 155, 156, and 160, which are reproduced in pertinent part at App. 27a-29a; § 4 of the Norris-LaGuardia Act ("NLGA"), 29 U.S.C. § 104, which is reproduced at App. 30a; and §§ 10505 and 10901 of the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 10505 and 10901, which are reproduced in pertinent part at App. 31a-34a.[1]

STATEMENT OF THE CASE

C&NW and FRVR are, respectively, the seller and purchaser in a line sale approved by the ICC through its so-called *"Ex Parte No. 392"* procedure under §§ 10505 and 10901 of the Interstate Commerce Act.[2] In

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[1] The Interstate Commerce Act was codified in 1978 as Subtitle IV of 49 U.S.C. (92 Stat. 1337). Citations herein to sections of the Act refer to those sections of 49 U.S.C.

[2] See *Ex Parte No. 392 (Sub. No. 1)—Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1985), *aff'd mem. sub nom. Illinois Commerce Comm'n* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987).

The C&NW-FRVR sale was before the Court this Term in No. 88-464, in which the Court denied a petition for certiorari by the Railway Labor Executives' Association ("RLEA"), a respondent in this matter, seeking review of a Seventh Circuit decision affirming a preliminary injunction under the RLA against a threatened strike to prevent the sale. *Chicago & N.W. Transp. Co.* v. *RLEA*, 855 F.2d 1277 (7th Cir.), *cert. denied*, 109 S. Ct. 493 (1988). The Seventh Circuit's decision was based on its determination that RLEA's claim that the sale's implementation would change employee rights under existing labor agreements was an arbitrable "minor" dispute. However, RLEA also has sought the right to bargain over

1987, C&NW and FRVR filed a petition with the ICC seeking a declaratory order "clarifying the agency's jurisdiction over labor issues arising out of transactions authorized by the Commission, including section 10901 transactions * * *." In particular, the petition asked the ICC to clarify whether "its jurisdiction * * * displaces the Railway Labor Act and the Norris-LaGuardia Act with respect to labor issues arising out of the transactions authorized by the Commission under the Interstate Commerce Act" in *Ex Parte No. 392* sales where the ICC has determined that the imposition of "labor protective conditions" is contrary to the public interest. Respondent Railway Labor Executives' Association ("RLEA") opposed that petition.

The ICC issued its decision on January 29, 1988, holding that the application of the RLA's bargaining provisions or the NLGA to labor disputes arising from *Ex Parte No. 392* line sales would interfere with the ICC's exercise of its jurisdiction under the ICA and with the legislative and regulatory scheme thereunder of encouraging the revitalization of the railroad industry through sales of marginal, potentially abandonable. lines to new operators. (App. 5a-8a, 17a-18a). The ICC noted "the importance of this agency's role in reconciling the conflicts between public need for an efficient transportation system (including the need for fair and equitable labor relations) and the private disputes that arise invariably from consolidations and restructurings within the rail system." (App. 15a). The ICC described its own "inherent powers to impose labor protection where necessary to ensure labor equity," and reviewed its historic role, mandated by Congress, in administering the ICA "as part of the complex of laws governing labor relations in the rail industry." (*Id.*). The ICC concluded:

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the sale's effects, and to strike under the RLA if no agreement is reached, and the questions whether the NLGA and RLA must be accommodated to the ICA are still pending in the Seventh Circuit litigation.

> "As with all adversarial proceedings those which come before the Commission generate winners and losers, but it must also be clear that participants ought to, after exhausting lawful appeals aimed at our authority and reasonableness, be reconciled to the process. Allowing a dispersion of authority will compound the problems to the detriment of the public and the transportation system. * * * We do not believe the law is so structured as to compel that outcome."

(App. 18a).

On February 19, 1988, RLEA petitioned the United States Court of Appeals for the Eighth Circuit for review of the ICC's declaratory order under 28 U.S.C. § 2342(5).[3] RLEA contended, *inter alia*, that the ICC's decision on the statutory accommodation issues was erroneous.

The court of appeals affirmed the ICC's holding that the RLA must be accommodated to the ICA (App. 2a), relying on its decision in *Burlington Northern R.R.* v. *United Transp. Union*, 848 F.2d 856 (8th Cir. 1988), where the court held that in *Ex Parte No. 392* line sales, "the ICA supersedes the authority of the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping process designed to reach labor protective agreements." 848 F.2d at 862. But the Eighth Circuit modified the ICC's holding that the NLGA must be accommodated to the ICA, because *Burlington Northern* had held that the ICA, while taking the place of the RLA in *Ex Parte No. 392* sales, is not itself a "labor statute" warranting accommodation of the NLGA (*id.* at 863). (App. 2a). The ICC's order was therefore "affirmed, as clarified by" the court. (App. 24a).

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[3] The court granted C&NW's motion to intervene as a respondent to defend the ICC's order on February 26, 1988; FRVR's similar motion was granted on March 31, 1988.

REASONS FOR GRANTING THE WRIT

The NLGA accommodation issue that the Eighth Circuit decided in this case clearly warrants review by this Court, for the Court has granted certiorari on that issue, as well as on the RLA accommodation issue the Eighth Circuit also decided here, in *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n*, Nos. 87-1589 and 87-1888 (argued March 29, 1989). The Court is currently holding in abeyance three other petitions for certiorari raising the same or similar issues pending the decision in *Pittsburgh & Lake Erie*.[4]

C&NW and FRVR submit that the Eighth Circuit's decision on the NLGA accommodation issue is erroneous. If the court of appeals was correct in holding that the ICA's labor protection provisions "supersede," *i.e.*, take the place of, RLA bargaining provisions in line sales, then the ICA is necessarily a labor statute to which the NLGA must be accommodated. See *Trainmen* v. *Chicago R. & I. Co.*, 353 U.S. 30 (1957). And the Eighth Circuit clearly was correct in holding that the ICA gives the ICC exclusive jurisdiction to address and if necessary remedy any adverse effects that line sales may have on employees, under the ICC's public interest mandate. *United States* v. *Lowden*, 308 U.S. 225 (1939). The NLGA accommodation issue, however (along with the RLA accommodation issue) may shortly be resolved by this Court in *Pittsburgh & Lake Erie*. C&NW and FRVR therefore urge the Court to grant this petition and

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[4] *City of Galveston* v. *Railway Labor Executives' Ass'n*, No. 88-517 (petition for certiorari to the Fifth Circuit); *Railway Labor Executives' Ass'n* v. *Chicago & N.W. Transp. Co.*, No. 87-2049 (petition for certiorari to the Eighth Circuit); *Railway Labor Executives' Ass'n* v. *Guilford Transp. Indus., Inc.*, No. 87-1911 (presenting the question whether the RLA's bargaining provisions are accommodated to the ICA in transactions approved by the ICC under § 11343 of the ICA and subject to mandatory labor protection under §§ 10505 and 11347 of the ICA).

reverse the decision below on the NLGA issue; but in any case this petition should be held, along with the other pending petitions, for disposition by the Court in accordance with the *Pittsburgh & Lake Erie* decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 20, 1989

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1280

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Intervenor/Respondent

FRVR CORPORATION,
Intervenor

Petition for Review of an Order of
Interstate Commerce Commission

Submitted: June 27, 1988

Filed: November 21, 1988

Before HEANEY, ARNOLD and FAGG, Circuit Judges.

HEANEY, Circuit Judge.

This matter is before the Court on the petition of the Railway Labor Executives' Association to review an order of the Interstate Commerce Commission. In a 3-2 decision, the Commission granted the request of the Chicago & Northwestern Transportation Company and Fox River Valley Railroad Company for a "clarification" of its jurisdiction. The Commission held that the Norris-LaGuardia Act and the Railway Labor Act must be accommodated to the authority of the Commission under section 10901 of the Interstate Commerce Act, 5 U.S.C. § 551, *et seq. FRVR Corporation—Exemption, Acquisition and Operation—Certain Lines of Chicago and North Western Transportation Company—Petition for Clarification*, Finance Docket No. 31205 (January 29, 1988). The association contends that the Commission was without authority to issue the decision and that, in any event, its decision was wrong.

On May 31, 1988, this Court issued an opinion in which we held that, while the Railway Labor Act must be accommodated to the Commission's "authority to supervise and implement labor protective conditions in terms of sales, acquisitions, and abandonments by railway carriers insofar as this authority is necessary to 'assure fair wages and working conditions,' " there is "no inherent incompatibility" between the recent deregulatory efforts of Congress and the ICC and the continued viability of the Norris-LaGuardia Act. Thus, we declined to enjoin the United Transportation Union from instituting a strike against the Burlington Northern Railroad Company. *Burlington Northern R.R., Co. v. United Transportation Union*, 848 F.2d 856, 864 (8th Cir.), *reh'g denied* (September 23, 1988, as amended) (LEXIS, U.S. App. 13050).

We hold that it is for this Court, not the Commission, to decide whether the Railway Labor Act and the Norris-

LaGuardia Act must be accommodated to the authority of the Commission under section 10901 of the Interstate Commerce Act, and we adhere to our decision on these questions in *Burlington Northern.*

FAGG, Circuit Judge, concurring and dissenting.

I agree this court, not the Commission, must ultimately decide to what extent the statutes implicated in this case are to be accommodated to one another. In a related context the court held the Interstate Commerce Act overrides the Railway Labor Act but not the Norris-LaGuardia Act. *See Burlington N. R.R. v. United Transp. Union*, 848 F.2d 856, 862-64 (8th Cir. 1988). Insofar as the court now "adhere[s] to [its] decision on these questions in *Burlington Northern*," *ante* at 2, I adhere to my dissent, *see Burlington N. R.R.*, 848 F.2d at 864-66 (Fagg, J., dissenting).

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31205

FRVR CORPORATION—EXEMPTION ACQUISITION AND OPERATION—CERTAIN LINES OF CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—PETITION FOR CLARIFICATION

Decided: January 28, 1988

This decision is issued in response to a petition filed by the Chicago and North Western Transportation Company (CNW) and FRVR Corporation. FRVR is a new corporation formed for the purpose of acquiring and operating certain rail lines of the CNW. Petitioners seek a statement of this agency's views as to our jurisdiction over labor issues arising out of the formation of short-line railroads. The matter has become controversial in the past several years, due to the acceleration in the creation of regional and short-line railroads.

Since partial deregulation under the Staggers Rail Act of 1980 [1] nearly 200 short-line and regional railroads have come into existence—partially reversing the industry's long trend of exit and contraction. These new roads now operate approximately 13 thousand miles of rail lines with 4 thousand workers handling more than 1.3 million carloads yearly.

Up until the Staggers Act, the principal means of exit for large "Class I" railroads from unprofitable markets had been through abandonment. Substantial deregulation of motor freight under the 1980 Motor Carrier Act [2] threatened to accelerate this trend through new and in-

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[1] Pub. L. No. 96-448, 94 Stat. 1941-45.

[2] Pub. L. No. 96-296, 94 Stat. 793.

creasingly efficient truck competition. Abandonment, by its nature, is most often a painful, disappointing process. It normally entails the permanent loss of jobs and railroad service, even though it has not always occurred in markets that are inherently unserviceable by rail. Markets that produce losses when operated by Class I railroads can produce profits for smaller, more efficient local carriers. These new carriers are potentially beneficial to nearly all concerned. They preserve rail service for the local economies and provide traffic feed for the larger carriers, enhancing employment prospects for rail labor—both on the smaller lines and throughout a reinvigorated Class I system—and they foster optimal recognition of the energy efficiencies and environmental benefits of rail service.[3]

The trend away from abandonment and towards the formation of short-line and regional carriers developed in response to the new business environment created by the Staggers Act. This development was given impetus by a change in 1982 in Commission labor protection policy which was in part based upon a provision of the Staggers Act which establishes a branch line sale process in which labor protection was foreclosed by the statute.[4] In the past, the typical sale of a short-line carrier might have been conditioned upon comprehensive (and potentially quite expensive) labor protection.[5] By 1982 the

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[3] The National Rail Transportation Policy charges the Commission with the responsibility of ensuring the development of a sound rail transportation system, while encouraging fair wages and safe and suitable working conditions for labor. The Commission is also to encourage and promote energy conservation. *See* 49 U.S.C. 10101a.

[4] 49 U.S.C. 10905. *See Simmons* v. *ICC*, 760 F.2d 126 (7th Cir. 1985).

[5] *See e.g., Durango and Silverton Narrow Gauge Railroad Co.—Acquisition and Operation*, 363 I.C.C. 292 (1979), *aff'd sub nom. Railway Labor Executives' Association* v. *United States*, 697 F.2d

Commission had determined that the expense of labor protection foreclosed short-line development, forcing the less attractive abandonment alternative or an abandonment and sale under the provisions of 49 U.S.C. 10905. As labor protection in short-line sales to new entrants is within the Commission's discretion, the Commission began to withhold protection in individual applications[6] on the three-part theory that (1) in doing so rail service would be preserved, (2) the new railroads provided the best prospect for protecting the employment prospects of the affected labor and (3) it made no sense to force railroads to go through the more cumbersome process of abandonment under 49 U.S.C. 10903 and sale under 49 U.S.C. 10905 to achieve the same result. After consideration of scores of individual applications, the Commission decided in a 1986 notice and comment rulemaking that the development of new small railroads was overwhelmingly beneficial and should be encouraged and allowed to proceed with a minimum of regulatory cost and delay.[7] The Commission issued rules exempting certain classes of line sales from drawn out Commission regulation, retaining for itself the unqualified right to review and correct any unique problems that might arise out of exceptional circumstances.[8]

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285 (10th Cir. 1983) (Review Board decision noting that imposition of labor protection was discretionary).

[6] *See Knox and Kane Railroad Co.—Gettysburg Railroad Co.—Petition for Exemption*, 366 I.C.C. 439 (1982).

[7] Ex Parte No. 392 (Sub No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, aff'd sub nom. Illinois Commerce Commission* v. *I.C.C.*, 817 F.2d 145 (DC Cir. 1987). This decision is in keeping with the National Transportation Policy of minimizing the need for Federal regulation (49 U.S.C. 10101a(2)), as well as the policies noted in footnote 3 above.

[8] The Staggers Act expanded the Commission's exemption authority. Further, as is stated in the Conference Report, the Commission is *actively* to pursue exemptions for transportation and is to

The Commission's policy has been validated by practical results. New railroad formation quickened,[9] abandonments fell,[10] service was maintained and typically improved, and rail jobs that might otherwise have been lost were preserved.[11] Most observers supported and welcomed the Commission's policy initiative, but it has been consistently opposed by organized rail labor. Under the rules adopted in 1986, opposition to individual transactions is presented in petitions to revoke the grant of exemption. Such petitions have been filed in approxi-

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have a policy of reviewing carrier actions *after the fact* to correct abuses. *See* H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 104-105.

[9] New Railroad Formation

Year Est.	Number
1982	25
1983	20
1984	31
1985	28
1986	45
1987*	70

* Preliminary figure based on notices filed.

[10] Miles of Lines Abandoned

Year	Miles
1982	5151
1983	2454
1984	3083
1985	2343
1986	2087
1987	1932

[11] The Commission's Office of Transportation Analysis is engaged in continuing study and research on the effect of the Commission's policy and the short-line/regional phenomenon. This study has included on-site interviews with labor and management, as well as data collection and analysis. This analysis demonstrates that employment on the new lines, particularly the larger regional carriers, is typically drawn from the work force of the selling carrier. Further, while initial employment levels are below those of the departing carrier, employment on some lines has grown over time as improved service attracts new business to the lines.

mately 20 of the 120 transactions processed under the 1986 rules. Where petitions to revoke are filed, the Commission evaluates the basis for the revocation request, and has well-defined authority to correct any abuses that are shown.[12] The Commission's authority includes the power to impose labor protective conditions through partial revocation,[13] although under the rules this step will be taken only where exceptional circumstances are shown. The Commission would consider as exceptional, situations in which there was misuse of the Commission's rules or precedent,[14] or where existing contracts specified that line sales were subject to procedural or substantive protection.[15] Further, the exemption will be modified where labor can demonstrate injury that was unique, disproportionate to the gains achieved for the local transport system, and which can be compensated without causing termination of the transaction or substantially undoing the prospective benefits of the Commission's existing policy for other communiites and locales.[16]

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[12] *See Consolidated Rail Corporation—Declaratory Order—Exemption*, 1 I.C.C.2d 895 (1986), *cited approvingly, G&T Terminal Packaging Co., Inc.*, v. *Consolidated Rail Corp.*, C.A. 84-1173 Slip op. (D.N.J. October 23, 1986). *See also* legislative history of the Staggers Act in footnote 8 above.

[13] *See Maryland Midland Railway, Inc.—Exemption from 49 U.S.C. 11343 and 11301* (not printed), served January 6, 1987.

[14] *Cf.* Order of Investigation, served May 18, 1987, in F.D. No. 30965, *Delaware and Hudson Railway Company—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company.*

[15] It is the Commission's standard labor protection policy in restructuring proceedings to preserve existing employment contracts insofar as possible, consistent with the merger, consolidation or abandonment authorized. *See* section 2 of the standard *New York Dock conditions*, 360 I.C.C. 84 (1979).

[16] *Cf. Northern Pacific Acquiring Corp. and Eureka Southern Railroad Co.—Exemption* F.D. 30555 (Decision served January 8, 1988).

The exemption proposal filed by CNW and FRVR corresponds quite well to our expectations and experience with the use of the Ex Parte 392 (Sub-No. 1) rules. At issue are 208 miles of light density lines in Eastern Wisconsin in the area between Green Bay and Milwaukee. The paper industry is the principal source of traffic and holds the greatest potential for traffic growth on the FRVR line. But to achieve growth means reversing the paper industry's increasing reliance on truck service. A verified statement filed by Petitioners indicates that rail market share of the outbound paper market was 54 percent of the total in 1977, but had fallen to under 20 percent by 1986. The number of motor carriers operating in the region has doubled and price competition is strenuous. The lines of the CNW may now be under additional pressure since its rail competition (which had been the Soo Line operating at relatively standard Class I costs) is a new regional operator, the Wisconsin Central. Wisconsin Central, as organized, has distinct cost advantages that will make long-term competition by CNW almost certainly impossible, absent a substantial improvement in efficiency and productivity.[17]

To work its way out of this predicament, CNW seeks to sell its line to the newly formed FRVR. FRVR has a management team drawn from the Wisconsin area and from within the rail industry, with experience in running a small railroad and marketing rail transportation to the paper industry. It intends to draw its work force from existing CNW employees where possible, and anticipates that it will operate as a union-represented company.[18] Its wage rates will be approximately 85 percent

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[17] Two petitions to revoke the Wisconsin Central exemption (F.D. No. 31102) are now before the Commission.

[18] Verified Statement of S. P. Selby. Selby states that CNW employees currently working on the affected lines are granted right of first hire selected in accordance with qualifications, work records, fitness and ability, and physical and medical standards. Selby states further that he has met with an officer of the Railway

of the Class I standard, and its work rules will give it substantial productivity improvement over the CNW operations. The company also anticipates use of an incentive bonus plan to further productivity. It will own its own engines, operate its own facilities, and rely principally on the CNW for car supply. It has trackage rights over CNW to connect into Milwaukee, and it has connections with other roads at points on the system. The company has already contacted shippers along the lines, and it filed 25 shipper letters acknowledging anticipated support and cooperation with its petition.

CNW estimates that the impact of the sale on its employees will be minimized by FRVR's commitment to the use of former CNW employees. For its part, CNW states that it has employment shortages elsewhere on its system, and that it will make these jobs available to workers effected by the FRVR sale. It anticipates that approximately 20 employees might still be left without employment either on FRVR or the CNW. It has offered a commitment of $30,000 per employee as a separation allowance for any employee unable to secure continued employment with either CNW, by exercising seniority, or with FRVR, under the right of first hire.[19] CNW has offered to meet with its unions to discuss this offer and related issues. According to Petitioner, the unions believe that such discussions must proceed under the auspices of the Railway Labor Act (RLA).[20] Bargaining under the RLA requires maintenance of the status quo, and permits resort to strikes, lockouts or other form of self-help if an impasse cannot be mediated. CNW takes the position that such bargaining gives labor the power to defeat the FRVR transaction, and is not required. However, in-

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Labor Executive's Association to work out a suitable arrangement for union representation of future employees. V.S., at 3-4.

[19] Verified statement of Robert Schmiege.

[20] 45 U.S.C. 151.

formal discussions have taken place, but no agreements have been reached.

CNW has petitioned for a declaration as to the Commission's view of its role in resolving any labor disputes which may arise in connection with the implementation of this Commission authorized transaction.[21] CNW asserts such an action is required to ensure a smooth implementation of the authorized transaction.

The Railway Labor Executives' Association (RLEA) has filed in opposition to the Petition of FRVR and CNW. RLEA believes that the Commission is without jurisdiction to issue the clarifying decision requested by Petitioners, and that Petitioners' argument on the merits is based on erroneous legal interpretations.

DISCUSSION AND CONCLUSIONS

The first of RLEA's propositions appears to be based on a misapprehension of the nature of a declaratory order. It seems beyond question that the Commission has the authority to issue declaratory opinions.[22] RLEA does not directly address this authority, arguing instead that the Interstate Commerce Act (ICA) does not vest this agency with the power "to decide the applicability and scope of other statutes"—that the "Commission is clearly not the tribunal to determine how to resolve conflicting mandates of the ICA and other statutes." That is true enough, if understood to mean that the Commission's opinions on statutory interpretation are, when chal-

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[21] Pursuant to our class exemption rules, 49 CFR 1150.31 *et seq.*, the CNW/FRVR exemption became effective December 30, seven days after filing. Petitioners indicated that they intend to defer consummation until the Commission responds to their petition for clarification. A related petition for exemption of a control relationship between FRVR and its parent corporation has also been filed.

[22] Pursuant to 5 U.S.C. 554(e), an administrative agency is empowered in its discretion to issue declaratory orders to terminate controversy or remove uncertainty.

lenged, subject to judicial review and possible override. There is no dispute over the fact of judicial primacy, but it does not follow that the Commission is foreclosed from expressing its viewpoint, or that such expressions may not issue in declaratory form, when related to the discharge of explicit statutory power, such as the power to approve or exempt the sale of a line of railroad. There is no need to deprive private parties and reviewing courts of the benefit of a clear statement of the Commission's viewpoint. The reason for declaratory opinions is to aid in clarifying and resolving controversies.

A part of the present controversy that requires clarification is whether the Railway Labor Act must be accommodated (in RLEA's words, subordinated) to the Interstate Commerce Act in the circumstances of an approved or exempted line sale arising under section 10901 of the ICA. A related issue is the immunity from injunction under the Norris-LaGuardia Act of a strike that threatens to prevent the consummation of a transaction so approved or exempted.

Until quite recently, it had been an established rule that the orders of the Commission approving the merger, sale, or abandonment of a line of railroad were not subject to collateral attack in the courts, and could not be frustrated by employee actions taken under the aegis of the Railway Labor Act or otherwise.[23] "Congress did not intend employees have such power to block consolidations which are in the public interest." [24] However, in a recent Third Circuit proceeding, *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Association* [25] (*Lake Erie*), it has been held that a district court has no jurisdiction

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[23] *Brotherhood of Locomotive Engineers* v. *C&NW*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

[24] *Missouri Pacific Railroad Company* v. *UTU*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3209 (1987).

[25] No. 87-3664, Slip op., October 26, 1987.

to enjoin a strike taken to block an ICC-approved sale. The Court based this holding on a finding that the Norris-LaGuardia Act need not be accommodated to the Interstate Commerce Act. This decision has had an immediate impact on the formation of small railroads,[26] threatening to halt the revitalization of the marginal railroad sectors—a restructuring that the Commission has found to be in the interest of carriers, labor, and the shipping public.

In its opposition response, RLEA takes the position that the Third Circuit *Lake Erie* decision is correct,[27] and that the Commission should conclude that the Interstate Commerce Act does not supersede the Railway Labor Act or Norris-LaGuardia. RLEA argues that *Brotherhood of R.R. Trainmen* v. *Chicago River and Indiana R.R.*[28] (*Chicago River*) *and Boys Markets Inc.* v. *Retail Clerk's Union*[29] (*Boys Market*)—Supreme Court "accommodation" cases relied on by Petitioners—are not controlling since they do not address the Interstate Commerce Act, but are limited to situations where aspects of national labor statutes were in conflict.[30] Hence, RLEA is

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[26] The *Lake Erie* decision has been followed by a Missouri federal district court, *Burlington Northern Railroad* v. *U.T.U.*, No. 86-5013, Slip op., October 26, 1987. (Missouri, Western District).

[27] The *Lake Erie* decision left open the issue of whether bargaining under the Railway Labor Act was necessary. The case was remanded to the district court on the RLA issue. The district court held the RLA applicable to the proposed sale and enjoined consummation of the transaction pending compliance with that act, finding that the Interstate Commerce Act does not operate to relieve the parties from their RLA obligations. *Railway Labor Executives' Assoc.* v. *Pittsburgh & Lake Erie Railroad,* No. 87-1745 Memorandum Opinion (Wes Dis. PA., No. 24, 1987). The case is back in the Third Circuit on appeal.

[28] 353 U.S. 30 (1957).

[29] 398 U.S. 235 (1970).

[30] Thus, in *Chicago River* an injunction against a strike was sustained where necessary to protect the Railway Labor Act's re-

in agreement with the *Lake Erie* court that statutory preemption of the Norris-LaGuardia no-injunction principle is limited to the need to accommodate other *labor* statutes. Without conceding its legitimacy, RLEA recognizes certain precedent to the effect that ICC authorization of a transaction under the merger provisions (49 U.S.C. 11343) will automatically relieve a carrier from the necessity of compliance with the Railway Labor Act to the extent necessary to go forward with the approved transaction. However, RLEA argues that this precedent has no relevance to 49 U.S.C. 10901 line sales. Unlike line sales, merger-orders are provided explicit preemption authority in 49 U.S.C. 11341 [31] and, as income protection and dispute resolution mechanisms are mandatory in merger proceedings,[32] labor is not "left out in the cold." [33] According to RLEA these are critical distinctions.

The broad issue presented by the CNW-FRVR Petition and the RLEA Opposition reply is whether the Interstate Commerce Act preempts the Railway Labor Act to

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quirement that "minor" grievances be submitted to arbitration. In *Boys Markets* the court reached a similar conclusion under the Labor Management Relations Act.

[31] A carrier or corporation participating in a transaction approved or exempted by the Commission under subchapter III of Chapter 113 "is exempt from the antitrust laws and from all other laws . . . as necessary to let that person carry out the transaction . . ." By its terms, this section does not apply to line sales under Chapter 109.

[32] 49 U.S.C. 11347.

[33] RLEA cites to language in *Missouri Pacific R. Co.* v. *United Transportation Union*, 782 F.2d 109 (8th Cir. 1986). This case held that a railroad is exempted under ICA Section 11341(a) from the Railway Labor Act in connection with a transaction approved under 49 U.S.C. 11343. Labor emphasizes that the court there reasoned that inferring preemption of the RLA was reasonable because mandatory labor protection is applied 782 F.2d at 112. There are chronological problems with placing much reliance on the reasoning. The preemption provision was first enacted in 1920, mandatory labor protection in 1940.

the extent necessary to allow the parties to consummate a transaction previously authorized by the Commission. Every court that had ruled on this precise issue prior to the *Lake Erie* decision had answered yes.[34] By so doing, courts have recognized the importance of this agency's role in reconciling the conflicts between public need for an efficient transportation system, (including the need for fair and equitable labor relations) and the private disputes that arise invariably from consolidations and restructurings within the rail system. The ICC has inherent powers to impose labor protection where necessary to ensure labor equity,[35] including the power to impose income guarantees and comprehensive schemes for alternative dispute resolution—mechanisms which may include notice, negotiation, a status quo requirement and arbitration. From the 1930's, when the ICC actively became involved in the administration of labor protection, Congress has routinely affirmed and expanded the importance of the Interstate Commerce Act as a part of the complex of laws governing labor relations in the rail industry. The Transportation Act of 1940 [36] was a legislative affirmation of the Commission's authority to impose labor protection, mandating the use of labor protection in mergers and consolidations.[37] The Railroad Revitalization

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[34] *See Missouri Pacific R. Co.* v. *United Transportation Union, supra; Brotherhood of Locomotive Engineers* v. *C&NW*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963). *Cf. ICC* v. *Locomotive Engineers*, 55 USLW 4771 (June 9, 1987) (Concurring Opinion of Justice Stevens, joined by Justices Brennan, Marshall and Blackmun).

[35] *United States* v. *Lowden*, 308 U.S. 225 (1939); *ICC* v. *Railway Labor Assn.*, 315 U.S. 373 (1942).

[36] 54 Stat. 899.

[37] The *Lowden* court, while noting the pendency of the legislation which was to become the 1940 Act, concluded that the legislative initiatives did not militate against the conclusion that the Commission had implied power over labor protection in consolidations, but rather that Congress merely sought to make mandatory what

and Regulatory Reform Act of 1976 [38] mandated labor protection in trackage rights, lease transactions, and abandonments. The Staggers Rail Act of 1980 made labor protection mandatory in connection with the abolition of rate bureaus (Section 219(g) and feeder line sales—section 401), as well as giving the Commission explicit discretion to impose protective conditions on reciprocal switching and on the construction of new rail lines. For more than fifty years the Commission has exercised its authority in this field, frequently at the request and with the support of labor, and our decisions have had enormous impact on the shape of rail labor relations throughout this period.

It is primarily due to the policy decision to withhold such protections taken in Ex Parte 392 (Sub-No. 1) (and in earlier individual proceedings) that the Commission's authority is under challenge. However, the Commission's policy determinations have been repeatedly sustained, and the existence of our jurisdiction may not hinge on the policy choice made.

In the first place, labor has not been left out in the cold. Affected parties were free to participate in the Ex Parte rulemaking, and are free to petition for its reopening. Indeed, aspects of the rulemaking are now under reconsideration in a reopened proceeding.[39] Further, in individual cases through the revocation process parties are given the opportunity to show that the policy norms of the Ex Parte rulemaking ought not apply. Full participation before the Commission is an important end in itself as it helps to inform the Commission of the

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was at the time discretionary. *United States* v. *Lowden, supra,* at 239.

[38] 90 Stat. 31.

[39] *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901,* Notice of Proposed Rulemaking served October 2, 1987.

range of problems and circumstances confronting transportation. If current policy does not provide routine protection, it is because experience has demonstrated that the formation of new lines would be thwarted, to the overall public detriment. Where exceptions are needed, the Commission has the authority to fashion a full remedy.

Jurisdiction is not determined by outcome. The Commission has exclusive and plenary jurisdiction over the sale, merger, or abandonment of rail lines.[40] This authority was granted by Congress as a part of a regulatory framework, to ensure a rail transportation system in the public interest. As a necessary component of this regulatory framework, the Commission has had to preempt on occasion the operation of other laws to the limited extent necessary to remove obstacles to Commission approved transactions. Such preemption of labor legislation has been upheld even in circumstances where the Commission did not provide labor protection under its auspices.[41] We believe this is the correct interpretation of the matter at issue.

The fact that a particular "labor outcome" does not dictate the extent or effect of ICC jurisdiction is a necessary correlative to the Commission's discharge of its responsibilities. That the concern for labor equity is only one of many conflicting aspects of National Transportation Policy should not be seen as a derogation of the agency's authority—rather it is precisely the reason why the Interstate Commerce Act must be recognized to have preeminence. It is the public policy of this Nation to regulate and supervise transportation at the national level so as to ensure the essential benefits of a critical

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[40] *Brotherhood of Locomotive Engineers* v. *C&NW, supra; Chicago and North Western Transportation Co.* v. *Kalo Brick and Tile Co.*, 450 U.S. 311 (1981).

[41] *RLEA* v. *Staten Island Railroad Corp.*, 792 F.2d 7 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 927 (1987).

aspect of commerce. While the means of regulation have changed markedly over the decades, the exclusive and plenary nature of the Commission's jurisdiction over consolidations, sales and abandonment has been consistently upheld. In the discharge of our responsibilities, we are charged with the expert resolution of many-sided conflicts between disputants, public and private. The recitation above of the factors leading to our small-railroad policy illustrates the complexity of the process and information that led to our present policy.

As with all adversarial proceedings those which come before the Commission generate winners and losers, but it must also be clear that participants ought to, after exhausting lawful appeals aimed at our authority and reasonableness, be reconciled to the process. Allowing a dispersion of authority will compound the problems to the detriment of the public and the transportation system. In the matter at hand, it cannot be doubted that a strike to prevent ICC-approved abandonment is susceptible to injunction. But it is now contended that such a strike can be used to prevent the development of an advantageous alternative to abandonment, despite the fact that Commission jurisdiction over these two types of restructuring is, in all relevant aspects, identical. Our expertise and experience, combined with our system-wide responsibilities, lead us to the conclusion that neither the public nor labor is adequately protected by encouraging a system that prefers abandonment to rejuvenation. We do not believe the law is so structured as to compel that outcome.

Organized as it is, FRVR stands a far better chance of developing a self-sustaining rail operation than does CNW. Over the past quarter century the miles of road operated by CNW has decreased by a third.[42] Its man-

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[42] *Moody's Transportation Manual* (1963 and 1987 issues) indicates that CNW operated over 15 thousand miles of road in 1962

agement goals include further reduction in size, either through line sales or abandonment. Whether the lines at issue here could be abandoned immediately under existing law has not been demonstrated. However, fierce trucking competition combined with CNW's comparative disadvantage in rail costs significantly increase the potential of future abandonment. Clearly, the National Transportation Policy will be advanced by permitting the sale of these lines to a willing, experienced and optimistic group of managers, who will in turn rely on experienced labor and a commitment to the local customer base in an attempt to revive and preserve competitive rail transportation for this region of Wisconsin.

This action will not significantly affect either the human environment or energy conservation.

It is ordered:

The Petition of CNW and FRVR for an order clarifying jurisdiction and other matters is granted.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Lamboley and Simmons. Commissioners Lamboley and Simmons dissented with separate expressions.

NORETA R. MCGEE
Secretary

(SEAL)

COMMISSIONER SIMMONS, dissenting:

I would have denied the petition for clarification. I have supported the policy expressed by the majority because I believe it has contributed, to some extent, to the preservation of rail lines that otherwise would have been

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(including miles operated under contract and trackage rights) but that total had declined to slightly over 10 thousand miles by 1986.

abandoned. However, I do not agree with the majority's use of such glowing terms to describe the efficacy of the Commission's denial of labor protection in so-called "short" line sales under 49 U.S.C. 10901. The language of the decision strongly implies that there can be virtually no valid justification for departure from this policy. Indeed, the decision to grant the petition for clarification and enter this declaratory order to enunciate a policy that has long been settled and affirmed in the courts indicates a certain lack of objectivity and fairness in the application of that policy.

We must not lose sight of our responsibility to weigh the interests of labor as a part of the public interest considerations associated with section 10901 sales. Neither this responsibility, nor the policy of which it is a part is enhanced by the gratuitous declaratory order entered here by the majority.

COMMISSIONER LAMBOLEY, dissenting:

While no one disputes the authority of the Commission to issue declaratory orders,[1] I believe to do so in this instance is an inappropriate use of process. In my view, there is insufficient evidence of controversy or uncertainty to warrant the issuance of this "clarifying" decision.

In invoking the class exemption process under Ex Parte No. 392 (Sub-No. 1)[2] petitioners have also requested that the agency declare that its authority under 49 U.S.C. 10901 supersedes the provisions of the Railway Labor Act (RLA)[3] and the Norris LaGuardia Act.[4] They do so

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[1] 5 U.S.C. 554(e).

[2] Ex Parte No. 392 (Sub-No. 1), *Class Exemption for Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985).

[3] 45 U.S.C. 151, *et seq.*

[4] 29 U.S.C. 101, *et seq.*

because of an alleged "climate of uncertainty" which it is claimed impedes consummation of the proposed transaction. Upon closer examination it becomes evident that the alleged controversy or uncertainty results from judicial decisions as well as petitioner's own conduct, neither of which the declaratory order requested from this agency will necessarily resolve. Indeed, this order may well exacerbate matters not only for this case but for constructive activities in this forum on such issues in the future.

Petitioners argue such action is necessary because several recent court decisions [5] "reflects a misapplication of the accommodation doctrine and a misunderstanding of this Commission's role in addressing labor issues pertaining to transactions within its jurisdiction." The petitioners do not agree with the outcome of judicial action in which they did not participate, although the Commission did. Without more, the petitioners simply request that the Commission here render a "proper" interpretation of applicable law by declaratory order. Petitioners offer neither substantial reason nor purpose for their request as it may relate to judicial activity.

Additionally, the petitioners claim the Commission's declaratory order is necessary because, while the CNW has met with the rail unions and informal discussions have taken place, no agreements have been reached since the unions believe (apparently contrary to petitioners) that RLA procedures apply to such discussions. The petitioners do not explain why they simply do not file a request with the Commission to fashion and impose appropriate

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[5] *Railway Labor Executives' Association v. Pittsburgh & Lake Erie R. Co.*, —— F.2d —— (No. 87-3664, 3rd Cir. October 26, 1987) (*P&LE I*) and *Railway Labor Executives' Association v. Pittsburgh and Lake Erie R. Co.*, Civil Action No. 87-1745 (W. D. Pa. Nov. 1987), appeal pending *sub nom. Railway Labor Executives' Ass'n v. Lake Erie Co.*, No. 87-3797 (3rd Cir. filed Nov. 25, 1987) (*P&LE II*).

protective conditions, with post consummation negotiation and arbitration procedures, if need be. Such request for relief would squarely address alleged controversy or uncertainty concerns relating to the process and substance of negotiation.

In sum, neither judicial action nor voluntary conduct is sufficient premise upon which to establish controversy or uncertainty as cause for declaratory relief in this case.

Further, quite apart from the lack of any legitimate, demonstrable need for declaratory relief, I fail to see that this order makes any significant contribution toward resolution of statutory "accommodation" issues. There is little doubt that the Commission does not have the requisite *jurisdiction* to interpret the applicability and scope of statutes other than the ICA. Certainly the agency may "express its viewpoint". Such as it is. It is a position which has been expressed repeatedly in court briefs [6] submitted by the Commission, and is well known. This decision appears to be little more than an attempt to supplement arguments in briefs previously filed and bolster prior discussion in Ex Parte No. 392 (Sub-No. 1).[7] It is self-serving and offers no new instruction.

Moreover, of particular concern here, is the eagerness to justify a well known position, the effect of which places the Commission in the position of apparent bias. This is especially true here because, in addition to the extended discussion of the Ex Parte No. 392 (Sub-No. 1) and preemption matters, this decision addresses specific employment security and displacement issues in this transaction, and consequently, in anticipatory fashion, effectively prejudices and precludes meaningful consideration of any

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[6] See for example the Commission's brief in *P&LE II*, also a letter to District Judge dated October 8, 1987.

[7] Ex Parte No. 392 (Sub-No. 1), *Class Exemption for Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985).

subsequent petition for revocation raising protective condition issues. The lack of agency constraint here has unfortunate ramifications.

Finally, after all things are considered, it is fair to say that any instability or uncertinty over employment security and displacement issues is largely a consequence of our own doing by decisions such as this, as well as those in Ex Parte No. 392 (Sub-No. 1) and its progeny. Legitimate transportation transactions under the ICA have been authorized in a manner which encourages and permits unilateral abrogation of legitimate, collective bargaining agreements and statutory requirements of the RLA, without procedural or substantive accommodation of respective interests. Mutuality and reciprocity in collective bargining contemplated by the RLA and resultant market-based arrangements have been nullified by our approach. It is small wonder then that the incentives for problem solving and dispute resolution through the negotiation process have been diminished and relations have become unstable.

It has become abundantly clear in these cases that the essence of the dispute is labor relations issues, not transportation.[8] Assuming jurisdiction, the Commission's current fixed position prevents adjustment and resolution in this forum.

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[8] See, also letter dated December 2, 1987 in Finance Docket No. 31163, *Winoma Bridge Railroad Company Trackage Rights—Burlington Northern Railroad Company.*

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1280

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Intervenor/Respondent,

FRVR CORPORATION,
Intervenor.

Petition for Review of an Order of
Interstate Commerce Commission

JUDGMENT

This cause was submitted on petition for review of an order of the Interstate Commerce Commission, administrative record, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the decision of the I.C.C. is affirmed as clarified by this Court. This Court, not the Commission, has ultimate

authority to decide to what extent the statutes involved in this case are to be accommodated to one another in accordance with the opinion of this Court.

November 21, 1988

A true copy.

ATTEST: /s/ Robert D. St. Vrain
Clerk
U.S. Court of Appeals
Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1280

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

Petition of an Order of
Interstate Commerce Commission

Petitioner's petition for rehearing has been considered by the Court and is denied.

January 30, 1989

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk
U.S. Court of Appeals
Eighth Circuit

Railway Labor Act, 45 U.S.C. § 151, *et seq.*

Section 2, First 45 U.S.C. § 152.

§ 152. General Duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 5, 45 U.S.C. § 155

§ 155. Function of Mediation Board

First. Disputes within jurisdiction of Mediation Board

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or any emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * * *

Section 6, 45 U.S.C. § 156

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being

held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

(May 20, 1926, c. 347, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197.)

Section 10, 45 U.S.C. § 160

§ 160. Emergency Board

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however*, that no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

* * * *

Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*

Section 4, 29 U.S.C. § 104

§ 104. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys of things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, arguing, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in Section 103 of this title.

(Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.)

Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*

Section 10505, 49 U.S.C. § 10505

§ 10505. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provision of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continued intermodal movement.

(g) The Commission may not exercise its authority under this section

(1) to authorize intermodal ownership that is otherwise prohibited by this title, or

(2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1361; Pub.L. 96-488, Title II, § 213, Oct. 14, 1980, 94 Stat. 1912.

Section 10901, 49 U.S.C. § 10901

§ 10901. Authorizing construction and operation of railroad lines

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line.

(b) A proceeding to grant authority under subsection (a) of this section begins with an application is filed. On receiving the application, the Commission shall—

(1) send a copy of the application to the chief executive officer of each State that would be directly affected by the construction or operation of the railroad line;

(2) send an accurate and understandable summary of the application to a newspaper of general circulation in each area that would be affected by the construction or operation of the railroad line;

(3) have a copy of the summary published in the Federal Register;

(4) take other reasonable and effective steps to publicize the application; and

(5) indicate in each transmission and publication that each interested person is entitled to recommend to the Commission that it approve, deny, or take other action concerning the application.

(c) (1) If the Commission—

(A) finds public convenience and necessity, it may—

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions the Commission finds necessary in the public interest; or

(B) fails to find public convenience and necessity, it may deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the construction or acquisition (or both) and operation approved by the Commission.

(d) (1) Where a rail carrier has been issued a certificate of public convenience and necessity by the Commission authorizing the construction or extension of a railroad line, no other rail carrier may block such construction or extension by refusing to permit the carrier to cross its property if (A) the construction does not unreasonably interfere with the operation of the crossed line, (B) the operation does not materially interfere with the operation of the crossed line, and (C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the carriers are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Commission for determination.

(e) The Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1402; Pub.L. 96-448, Title II, § 221, Oct. 14, 1980, 94 Stat. 1928.

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No. 88-1706

In the Supreme Court of the United States

OCTOBER TERM, 1988

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY AND FRVR CORPORATION, PETITIONERS

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION AND INTERSTATE COMMERCE COMMISSION, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT INTERSTATE COMMERCE COMMISSION IN SUPPORT OF PETITION

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34 pp

QUESTIONS PRESENTED

Whether authorization of a consolidation, abandonment, sale or other disposition of rail property by the Interstate Commerce Commission results in displacement of the Railway Labor Act (RLA) by the Interstate Commerce Act (ICA) as the mechanism for resolving labor disputes arising out of the authorized transaction, as the court below held.

If so, whether the Norris-LaGuardia Act (NLGA) prevents issuance of an injunction to enforce compliance with the statutory scheme of the ICA that provides a means for final resolution of disputes substantially identical to that provided for resolution of minor disputes under the RLA, as a majority of the dividend panel below concluded.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1706

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY AND FRVR CORPORATION, PETITIONERS

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION AND INTERSTATE COMMERCE COMMISSION, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT INTERSTATE COMMERCE COMMISSION IN SUPPORT OF PETITION

On April 20, 1989, petitioners Chicago & North Western Transportation Company ("C&NW") and FRVR Corporation ("FRVR") filed a petition with this Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the decision and judgment of that Court, styled as *Railway Labor Executives' Ass'n v. Interstate Commerce Commission*, 861 F.2d 1082, (8th Cir. 1988), which affirmed in part and modified in part an order of the Interstate Commerce Commission in Finance Docket No. 31205, *FRVR Corporation–Exemption, Acquisition and Operation–Certain Lines of Chicago and North Western*

Transportation Company–Petition for Clarification (served January 29, 1988). The Interstate Commerce Commission ("Commission") respondent in the court below, pursuant to 28 U.S.C. 2341 et seq., respectfully files this brief in support of the petition.

The issues of whether Commission approval of a transaction eliminates the employer's obligation to bargain under Section 6 of the RLA and the effect of a decision on that issue upon the prohibition against injunctions contained in Section 4 of the Norris LaGuardia Act are questions of sufficient importance to the rail industry and the Commission's administration of the Interstate Commerce Act as to have caused both the United States and the Interstate Commerce Commission to urge this Court to grant writs of certiorari in the *P&LE Cases*, Nos. 87-1589 and 87-1888. See especially Brief of United States as Amicus Curiae in Nos. 87-1589 and 87-1888, dated November 1988. This Court granted writs of certiorari in those cases which were argued March 29, 1989.

Although as the United States noted in its previously referred to brief, those questions are fairly presented in the *P&LE Cases*, the Court may not deem resolving them indispensable to a decision in those cases and hence may not reach them. Resolution of those issues is even more urgent now than it was in the Fall of 1988, because the hiatus in the Commission's 10901 line sale program resulting from the initial decision in P&LE I in October of 1987 has continued unabated. Accordingly, the Interstate Commerce Commission urges the Court to grant a writ of certiorari and hold this petition with the other pending petitions[1] for disposition by the Court in the light of its *P&LE Cases* decision.

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[1] The Court has pending three other petitions for certiorari raising similar issues. *City of Galveston v. Railway Labor*

STATEMENT OF THE CASE

1. Under Section 10901 of the Interstate Commerce Act (ICA), a non-carrier can acquire and operate a railroad line "only if the Commission finds that the public convenience and necessity require or permit" that it be done. 49 U.S.C. 10901(a). If the Commission finds that the acquisition is in the public interest, it may approve the acquisition with such conditions, including labor protective conditions, as the Commission "finds necessary in the public interest. . ."[2]. 49 U.S.C. 10901(c)(1)(A)(ii).

Under Section 10505 of the ICA, the Commission has the power to exempt rail transportation from the requirements of the Act. Indeed, the Commission "shall exempt" rail transportation "when the Commission finds that the application of a provision of this subtitle . . . is not necessary to carry out the transportation policy of Section 10101a." 49 U.S.C. 10505(a)(1). The Commission retains its regulatory jurisdiction over the

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Executives' Ass'n, No. 88-517 (petition for writ of certiorari to the Fifth Circuit); *Railway Labor Executives' Ass'n v. Chicago & North Western Transp. Co.*, No. 87-2049 (petition for writ of certiorari to the Eighth Circuit); *Railway Labor Executives' Ass'n v. Guilford Transp. Indus., Inc.*, No. 87-1911 (petition for writ of certiorari to the First Circuit). These cases present the issue of whether the Interstate Commerce Act ("ICA") may supercede provisions of the Railway Labor Act ("RLA") in those cases where the provisions of the latter statute act as obstacles to the consummation of a Commission approved transaction. The Eighth Circuit has previously held that the ICA supercedes the RLA. *Burlington Northern Railroad Co. v. United Transportation Union*, 848 F.2d 856 (8th Cir.) *cert. denied sub nom. Interstate Commerce Commission v. United Transportation Union*, 109 S.Ct. 499 (1988).

[2] See, e.g., *ICC v. Railway Labor Executives' Ass'n*, 315 U.S. 373 (1942); *CMC Real Estate Corp. v. ICC*, 807 F.2d 1025 (D.C. Cir. 1986).

exempt transaction.[3] The Commission may revoke any exemption to the extent the agency finds it "necessary to carry out the transportation policy of Section 10101a." 49 U.S.C. 10505(d). The Commission may not exercise its authority to relieve a carrier of its obligation to protect the interests of employees. 49 U.S.C. 10505(g).

A sea change in the approach to regulation of the nation's rail industry followed the passage of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1941-45. The Staggers Act made possible the sale of marginally profitable rail lines by Class 1 railroads to new entrants in the industry. The new entrants utilize these lines to create short lines and regional carriers to provide new and more creative rail service. Before this trend such marginal lines were simply abandoned and taken out of service, eliminating rail service and the jobs, both on the railroad and in the local community, such service provided. The Commission monitored this trend and determined that the expense of satisfying labor protective conditions suitable for major rail consolidations or line abandonments, if imposed on the sale of a line to a new entrant under Section 10901, would defeat shortline development and force Class 1 carriers to return to the abandonment of these lines.

As the imposition of labor protection in short line sales is within the Commission's discretion, the Commission began withholding labor protective conditions in individual applications.[4] After considering many in-

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[3] See, e.g., *UTU v. Norfolk & Western R. Co.*, 822 F.2d 1114 (D.C. Cir. 1987) *cert. denied*, 108 S.Ct. 700 (1988); *G&T Terminal Packaging v. Consolidated Rail Corp.*, 830 F.2d 1230, 1234-1235 (3d Cir. 1987), *cert. denied*, 108 S.Ct. 1291 (1988).

[4] See, *Knox and Kane Railroad Co.–Gettsburg Railroad–Petition for Exemption*, 366 I.C.C. 439 (1982). The Commission theory

dividual applications, the Commission determined that the formation of new carriers which this policy furthered was beneficial to all concerned. To encourage this trend the Commission promulgated the procedures in Ex Parte 392 (Sub-No.1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *aff'd sub nom. Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (mem.) ("*Ex Parte 392*").

Ex Parte 392 established a program by which a carrier could apply for an exemption which would be granted seven days after filing unless the Commission notified the parties to the contrary. Any opposition to the exemption may be presented to the Commission in a petition to revoke the exemption which may be filed at any time. The Commission evaluates the petition and retains authority under its revocation power to correct any problem arising from the transaction. The Commission's list of remedies to correct any such problem range from partial revocation and imposition of labor protections to the termination of the entire exemption.[5] Of

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on withholding protection was grounded on the premises of (1) the preservation of rail service, (2) continued service offers the best opportunity to rail labor for employment, and (3) the process is less cumbersome than abandonment under Section 10903 and sale under Section 10905, the use of which achieves that same result as a Section 10901 sale without labor protection.

[5] The courts have acknowledged that the *Ex Parte 392* line sales program is consistent with the policies expressed by Congress in the Staggers Act amendment to the ICA. *Illinois Commerce Commission v. ICC, supra*; and see, *Pittsburgh & Lake Erie R.R. Co. v. RLEA*, 845 F.2d 420 (3d Cir. 1988). The Staggers Act expanded the Commission's exemption authority. Moreover, Congress directed the Commission to pursue exemptions for transportation operations and to review carrier actions after the fact to correct abuses.

course, the Commission order disposing of the revocation petition is reviewable in the Courts of Appeals. 28 U.S.C. 2342.

As the Commission's data shows, *Ex Parte 392* and the underlying policy has been successful. Railroad formation rose each year since 1982 and the miles of lines abandoned fell each year until the Third Circuit's decisions in *Pittsburgh & Lake Erie R.R. Co. v. RLEA*, 831 F.2d 1231 (*P&LE I*) and *Pittsburgh & Lake Erie R.R. Co. v. RLEA*, 845 F.2d 420 (*P&LE II*) *supra*, were announced in January and April, 1988.[6]

2. The case at bar arose when C&NW, a Class 1 carrier regulated by the Commission, determined to sell one of its lines ("Duck Creek South") to FRVR pursuant to *Ex Parte 392*.[7] C&NW and FRVR filed an exemption request on December 23, 1987. Accompanying the exemption request was a "petition for clarification" asking the Commission to clarify its view as to "the agency's exclusive jurisdiction over labor issues arising out of ICC authorized transactions. . .". The exemption, effective seven days after filing, authorized the sale of the rail line and allowed FRVR to purchase the rail line without the imposition of labor protective conditions.[8]

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[6] On an annualized basis the number of entrants seeking exemptions under *Ex Parte 392* has decreased by approximately 50% from 1987 to 1988. The mileage requested to be transferred under *Ex Parte 392* has decreased by 85%. In contrast the number of miles sought to be abandoned increased for the first year since 1982 from 1,932 in fiscal year 1987 to 2,996 in fiscal year 1988.

[7] FRVR has not previously engaged in the rail business. Therefore it is treated by the Commission as a non-carrier.

[8] On January 19, 1988, C&NW filed a declaratory order action with the United States District Court for the Eastern District of Illinois seeking a judgment that the proposed sale of the Duck Creek South line to FRVR and any labor protective provisions that might

RLEA filed a petition for revocation of the exemption and an opposition to the C&NW petition for clarification. On January 29, 1988, the Commission served a decision responding to the petition for clarification. Finance Docket No. 31205, *FRVR Corp., etc.–Petition for Clarification.* The Commission decision reaffirmed the Commission's position that the ICA grants the Commission exclusive and plenary authority to deal with labor issues that if unresolved would act as obstacles to the consummation of these Commission authorized transactions.

On February 19, 1988, RLEA filed a petition for review of this decision with the Eighth Circuit court of appeals contending that the Commission lacked the authority to issue any decision on the question of the ICA's supersession of any other law and that even granting the Commission's authority to issue its decision the decision was wrong on the merits. A unanimous

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accompany the sale were subject to the exclusive jurisdiction of the Commission and therefore were not a proper subject of bargaining under the Railway Labor Act. During the pendency of this action rail labor informed C&NW of their intent to strike if the sale were consummated. C&NW filed in the district court a motion for a temporary restraining order and preliminary injunction to prevent the strike. RLEA filed cross motions to enjoin the sale and in opposition to the orders sought by C&NW. The court refused to enjoin the sale, holding that it was without jurisdiction to do so because RLEA's effort constituted an impermissible collateral attack on an ICC order. The district court also granted the motion for a preliminary injunction against the strike determining that the dispute between RLEA and C&NW was a "minor dispute" under the RLA dispute resolution procedures and therefore subject to the exclusive jurisdiction of the National Railroad Adjustment Board. This decision was upheld on appeal. *Chicago & North Western Transp. Co. v. RLEA*, 855 F.2d 1277 (7th Cir. 1988) *cert. denied*, 109 S.Ct. 493 (1988).

panel of the Eighth Circuit affirmed the Commission's holding that the RLA must be deemed to be displaced by the ICA to give substance to the "Commission's 'authority to supervise and implement labor protective conditions in terms of sales, acquisitions, and abandonments by railway carriers insofar as this authority is necessary to assure fair wages and working conditions.' " *RLEA v. ICC*, 861 F.2d 1062 (8th Cir. 1988), *reh'g denied* (January 30, 1989) quoting *Burlington Northern R.R. Co. v. United Transportation Union*, 848 F.2d 856, 864 (8th Cir.), *reh'g denied* (September 23, 1988, as amended) *cert. denied sub nom. Interstate Commerce Commission v. United Transportation Union*, 109 S.Ct. 499 (1988). The unanimous panel also held that the Commission's authority "supercedes the authority of the mandatory bargaining provisions of the RLA." *Id.*

However, the majority of a divided panel refused to find a need to accommodate the prohibition against injunctions contained in Section 4 of the NLGA to the ICA, holding that "there is 'no inherent incompatibility' between the recent deregulatory efforts of Congress and the ICC and the continued viability of the Norris-LaGuardia Act." *RLEA v. ICC, supra,* at 1082. Thus, the majority would decline to enjoin rail labor from striking to prevent the consummation of the transaction. *Id.* In a concurring and dissenting opinion Circuit Judge Fagg adhered to his dissent in *Burlington Northern R.R. Co. v. UTU, supra,* that injunctive relief must be available to protect a Commission order from disruption by a strike that challenges the terms of that order and in fact works an "unacceptable neutralization" of the Congressional policy in favor of the Commission's exercise of its authority. *Id.* at 866.

3. As the United States observed in its brief as Amicus Curiae in the *P&LE Cases,* the question of

whether Section 4 deprives a federal court of jurisdiction to enjoin a labor strike designed to block going forward with an ICC-approved rail transaction has immense "practical importance since it typically is the first – and often the most pressing – issue for the courts to decide in labor-management disputes arising out of line sales." Brief pp. 17-18.

Indeed, the answer the courts give to that question will determine whether there will be any line sales, and if so, on what terms. There have been no line sales of any significance upon terms authorized by the Commission since October of 1987 when the Third Circuit Court of Appeals held that federal courts were powerless to enjoin labor strikes designed to block implementation of ICC authorized transactions and vacated the injunction against P&LE's employees striking to block the Commission authorized sale involved in that proceeding. Those decisions are presently before this Court in the *P&LE Cases,* Nos. 87-1589 and 87-1888.

In fact only one line sale of any significance has been accomplished and that happened because management totally acceded to rail labor's terms upon failing to obtain an injunction against a strike designed to prevent the transaction from the United States Court of Appeals for the Eighth Circuit. See, *Burlington Northern R.R. v. United Transportation Union,* 848 F.2d 856, *cert. denied,* 109 S.Ct. 499 (1988). That decision, which was followed by the majority below over the vigorous dissent of Judge Fagg, reiterated by him in dissenting in part from the decision below, is reproduced in the appendix hereto.

The fallacy of the position of the majority is apparent. Although finding that the ICA's dispute resolution procedures, which are substantially identical to the RLA

procedures for resolving "minor disputes," displace RLA procedures in these rail transactions, the majority below held itself precluded from affording the ICA's procedures the protection required to allow them to resolve any labor dispute so as to prevent frustration of the transaction, despite the holdings of this Court in *Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R.*, 353 U.S. 30 (1957); *Boys Markets, Inc. v. Retail Clerks Union,* 398 U.S. 235 (1970).

CONCLUSION

The petition for a writ of certiorari in No. 88-1706 should be granted and the case held for disposition in light of this Court's decision in the *P&LE Cases,* Nos. 87-1589 and 87-1888.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 87-2581

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLEE

v.

UNITED TRANSPORTATION UNION, APPELLANT

FRED A. HARDIN, J.W. REYNOLDS, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, J. F. SYTSMA AND W. C. WALPERT

RAILWAY LABOR EXECUTIVES' ASSOCIATION

v.

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLEE

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, UNITED TRANSPORTATION UNION, APPELLANT

No. 87-2600

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLANT

v.

UNITED TRANSPORTATION UNION, APPELLEE

FRED A. HARDIN, J.W. REYNOLDS, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, J. F. SYTSMA AND W. C. WALPERT

RAILWAY LABOR EXECUTIVES' ASSOCIATION

v.

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLANT

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, UNITED TRANSPORTATION UNION, APPELLEE

Appeal from the United States District Court for the Western District of Missouri

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Submitted: December 15, 1987
Filed: May 31, 1988

Before HEANEY, ARNOLD and FAGG, Circuit Judges

HEANEY, Circuit Judge.

I. *Overview*

Burlington Northern Railroad Company (BN) announced its intention to sell a section of its rail lines to the Montana Rail Link (MRL), a newly formed corporation. This type of transaction was recently exempted from Interstate Commerce Commission (ICC) approval requirements, which generally involved the imposition of labor protective conditions. *See Ex Parte No. 392 (Sub. No. 1), Class Exemption for the Acquisition and*

Operation of Rail Lines under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1986), *review denied sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (*Ex Parte No. 392*). After unsuccessfully attempting both to engage BN in negotiations over the effects of the sale on BN employees and later to enjoin the sale, the United Transportation Union (UTU) threatened to strike. BN sought a preliminary injunction against the strike. The district court denied BN's request, finding the Norris-LaGuardia Act, 29 U.S.C. §§ 110-115 (Norris-LaGuardia) prohibited such relief. It did, however, grant an injunction pending review by our Court. On appeal, BN claims that Norris-LaGuardia must be accommodated to the action of the ICC in *Ex Parte No. 392*, and thus cannot bar an injunction. Alternatively, it argues that the Railway Labor Act, 45 U.S.C. § 151-188 (RLA), prohibits the strike because the UTU has not exhausted major dispute procedures under that Act.

We affirm the decision of the district court insofar as it held that Norris-LaGuardia prevents the issuance of an injunction here, and we dissolve the injunction issued by the district court pending this appeal. Second, we find the RLA's major dispute procedures are, in this instance, superseded by the terms of the Interstate Commerce Act, 49 U.S.C. § 10101-11917 (ICA), and thus cannot bar the strike.

II. *Factual Background*

In July, 1987, BN announced its intention to lease approximately 830 miles of its trackage to MRL, a newly formed corporation. These rail lines extend from Huntley, Montana, to Sand Point, Idaho. BN also proposed to sell various branch lines, equipment, personal property,

and facilities to MRL. In the past, this transaction would have been contingent upon the approval of the ICC, and labor protective conditions would normally have been imposed for the protection of BN employees. However, recently, such sales have been exempted from ICC approval procedures. *See Ex Parte No. 392*, 1 I.C.C.2d 810 (1986).

In compliance with *Ex Part No. 392*, MRL filed a petition for exemption. Under the terms of *Ex Parte No. 392*, such exemptions are automatically granted seven days after they are filed. *See* 49 C.F.R. § 1150.32(b). Several parties requested a stay of the exemption. The ICC, however, denied those requests and the exemption issued on July 31, 1987. Finance Docket No. 31087, decided July 31, 1987, *Montana Rail Link, Inc.–Exemption Acquisition and Operation–Certain Lines of the Burlington Northern Rail Company.* Subsequently, a number of the unions representing BN employees, including the UTU, filed petitions to revoke the exemption. These petitions requested labor protection for BN employees affected by BN's action. The ICC has not yet ruled on these petitions. The transaction was closed on October 31, 1987, after the ICC made a specific finding that it was "in the public interest' and after the unions unsuccessfully sought an injunction against the transaction in the United States District Court for the District of Montana. *United Transp. Union v. Burlington Northern R.R.*, 672 F. Supp. 1579 (D. Mont. 1987).

Before the Montana district court, the unions sought to enjoin the sale and maintain the status quo until the arbitration and mediation provisions of the RLA were exhausted. The district court refused to grant this request. Relying on *Railway Labor Executives' Ass'n v. Staten Island R.R.*, 792 F.2d 7 (2d Cir. 1986,), *cert.*

denied, ___ U.S. ___, 107 S.Ct. 927 (1987), it found that the mandatory bargaining procedures of the RLA would frustrate the action of the ICC and thus did not provide the court with authority to issue an injunction. 672 F. Supp. at 1582. However, the court, citing *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3d Cir. 1987). did note that there was no inherent incompatibility between the ICC's action and the provisions of Norris-LaGuardia, thus suggesting that Norris-LaGuardia would bar an effort to enjoin a subsequent strike by the unions. 672 F. Supp. at 1582-83 n. 4. The UTU has appealed this decision to the Ninth Circuit.

After the Montana district court denied the unions' motion to enjoin the sale, the UTU threatened a nationwide strike against BN. BN immediately sought a temporary restraining order and a preliminary injunction from Judge Joseph E. Stevens of the United States District Court for the Western District of Missouri. *See Burlington Northern R.R. v. United Transp. Union*, No. 86-5013-CV-SW-8, slip op. (W.D. Mo. Nov. 16, 1987). The court granted the temporary restraining order but subsequently denied the request for a preliminary injunction. In declining to issue a preliminary injunction, Judge Stevens placed primary reliance on *Pittsburgh and Lake Erie*, 831 F.2d 1231. A few hours later, the court granted BN's motion for an injunction pending appeal. We denied UTU's motion to suspend the injunction pending appeal and directed BN to avoid further layoffs until we had decided the matter.

On appeal, BN contends that the ICA vests the ICC with exclusive and plenary jurisdiction to resolve disputed issues. Thus, they argue, Norris-LaGuardia

does not bar an injunction against the proposed strike. Second, BN maintains the RLA prohibits the strike since UTU has not exhausted major dispute procedures.

III. *The ICA, the RLA and Norris-LaGuardia*

A. Statutory Framework

1. The Interstate Commerce Act (ICA)

The ICA is fundamentally a statute designed to regulate commerce. Its goal is to make commerce flow smoothly to the benefit of both American industry and consumers. The Act seeks to ensure fair shipping rates, safety and efficiency in transportation, and to preserve the viability of various modes of transportation. The ICA also seeks to discourage harmful monopolistic practices, detrimental state regulation, and labor strife – all of which tend to impede commerce to the detriment of industry and consumers. *See* 49 U.S.C. §§ 10101, 10101a.

The ICA generally requires that before a railroad acquires an additional line or abandons a line, the rail carriers involved in the transaction must obtain the approval of the ICC. 49 U.S.C. §§ 10901, 10903. Pursuant to the ICA's goal of preventing labor strife by "encourag[ing] fair wages and safe and suitable working conditions in the railroad industry," *see* 49 U.S.C. § 10101a(12), approval by the ICC has in the past generally required the imposition of plans to compensate workers displaced by the particular transaction. These plans are called labor protective conditions or labor protective agreements. Under its authority, the ICC has developed standard labor protective conditions for particular types of transactions.[1]

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[1] When the transaction involves the sale of a rail line, the ICC imposes its *New York Dock* conditions upon the parties. *See New*

In the early 1970's the railroad industry, for a variety of reasons, began to experience economic difficulty. In 1976, concern about the "financial health" of this industry prompted Congress to pass the Railroad Revitalization and Regulatory Reform (4-R) Act, Pub. L. No. 94-210, 90 Stat. 31 (1976). The 4-R Act empowered the ICC, *inter alia*, to exempt individual transactions or classes of transactions from the Act's prior approval requirements (and thus avoid the cost of labor protective conditions). Pub. L. No. 94-210, 90 Stat. at 42.

Four years later, in another deregulatory effect, Congress passed the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980). In the Staggers Act, Congress attempted to "reduce regulatory barriers to entry into and exit from the [railroad] industry." *Id.* § 101(a), 94 Stat. 1897, codified at 49 U.S.C. § 10101a. Specifically, the Act broadened the exemption provisions codified at 49 U.S.C. § 10505, to provide that exemptions "shall" be granted to carry out the Staggers Act national rail policy. 94 Stat. at 1913.

In 1986, the ICC, in an ex parte rule-making procedure, exercised its new section 10505 power to exempt, as a class, line sales to "new carriers"[2] from the detailed approval procedures required under section 10901. *See Ex Parte No. 392*, 1 I.C.C.2d 810 (1986). To facilitate these sales, the ICC further prescribed an expedited approval procedure in place of the procedure that would otherwise apply under section 10901(b).

York Dock Ry.–Control–Brooklyn E.D. Terminal, 360 I.C.C. 60 (1979), *aff'd*, 609 F.2d 83 (2d Cir. 1979). If it is a case of abandonment, it imposes *Oregon Short Line III* conditions. *See Oregon Short Line R.R.–Abandonment*, 360 I.C.C. 91 (1979).

[2] "New carrier" means a newly formed railroad not already subject to the ICA.

Under the class exemption, sales to new carriers are authorized to go forward seven days after the parties file verified notices with the ICC. *Id.* at 820, *see also* 49 C.F.R. § 1150.32(b).

The ICC's action in *Ex Parte No. 392* was appealed to the United States Court of Appeals for the District of Columbia Circuit. That court denied review of the ICC's action without an opinion. *Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).

2. The Railway Labor Act (RLA)

The RLA regulates the relationship between railroads and their employees. The purposes of the Act include avoiding interruption to commerce, ensuring worker freedom of association and the right to unionize, providing for the "prompt and orderly" settlement of employment related disputes, and securing the "complete independence" of railroads and their employees in matters of self-organization and in carrying out the Act's other purposes. *See* 45 U.S.C. § 151a.

Under the RLA, controversies over proposed changes in collective bargaining agreements are termed "major" disputes (to be distinguished from "minor" disputes over the "interpretation or application"of existing agreements and practices). *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723-24 (1945). Under §§ 2 Seventh and 6 of the Act, a party desiring to change a working condition embodied in an existing agreement, or to bring a condition not previously covered within an agreement, must serve a "§ 6 notice" upon the opposing party. 45 U.S.C. §§ 152 Seventh, 156. The resulting major dispute is subject to dispute resolution including conferences, mediation, and, in some cases, proceedings before a presidential emergency board. 45 U.S.C.

§§ 155, 156, 160. Until these procedures are exhausted, neither party may change the status quo, i.e., the "actual objective working conditions" in existence at the beginning of the dispute. *Detroit & T. Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149, 153 (1969).[3]

3. The Norris-LaGuardia Act

The Norris-LaGuardia Act withdraws jurisdiction from the federal courts in cases growing out of labor disputes. The Act clearly states:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as the terms are herein defined) from * * *
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment.

29 U.S.C. § 104.

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[3] The Act lacks any mechanism to compel agreement in major disputes. Binding arbitration of a major dispute is available only if both parties agree to it. *See* 45 U.S.C. §§ 155, 157; *Elgin J. & E. Ry.*, 325 U.S. at 725.

Section 3 of the RLA commits minor disputes over the "interpretation or application" of existing agreements and practices to the exclusive jurisdiction of Adjustment Boards, i.e., to "compulsory arbitration." *Brotherhood of R.R. Trainmen v. Chicago R. & I. R. R.*, 353 U.S. 30, 39 (1957); 45 U.S.C. § 153 First (i); *see Elgin J. & E. Ry.*, 325 U.S. at 724. If the resolution of a labor dispute arguably depends upon the interpretation or application of a collective bargaining agreement or established past practice, the dispute must go to an Adjustment Board, not to a court. *Brotherhood of Maintenance of Way Employes v. Burlington Northern Ry.*, 802 F.2d 1016, 1022, (8th Cir. 1986). While the controversy is pending before the Board, the carrier is free to apply its interpretation of the disputed agreement or past practices. *Id.*

The public policy behind Norris-LaGuardia is clearly stated in the Act. Specifically, the Congress found that prevailing socio-political and economic conditions prevented individual workers from obtaining "acceptable terms and conditions of employment." Therefore, Norris-LaGuardia sought to ensure workers the right to organize and conduct union activities "free from the interference, restraint, or coercion" of employers or their agents by means of labor injunctions. *See* 29 U.S.C. § 102.

B. Analysis

As noted above, the ICA is fundamentally a commerce statute directed toward ensuring the free flow of commerce. The RLA is a labor statute that orders the relationship between railroads and their employees. Norris-LaGuardia is a jurisdictional labor statute designed to deal with historical anti-union animus in the federal courts by withdrawing jurisdiction in cases growing out of labor disputes. Each of these congressional enactments are intended to be preeminent in terms of the subject matter they regulate. However, toward the periphery of the authority granted under each law, there exist overlapping powers and responsibilities which must be accommodated and harmonized.

For example, when the imperatives of labor statutes such as the RLA and Norris-LaGuardia conflict, the federal courts have determined that if the provisions of the RLA represent some "overriding, equally clear yet irreconcilable labor policy" which would be frustrated by the literal enforcement of Norris-LaGuardia's anti-injunction provisions, the latter act can be accommodated. *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231, (citing *Chicago &*

North Western Ry. v. United Transp. Union, 402 U.S. 570 (1971); *Boys Market, Inc. v. Retail Clerk's Union Local 770*, 398 U.S. 235 (1970); *Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R.*, 373 U.S. 33 (1963); *Brotherhood of R.R. Trainmen v. Chicago & Indiana R.R.*, 353 U.S. 30 (1957); *Brotherhood of Ry. Trainmen v. Howard*, 343 U.S. 768 (1952)).

Yet, the problem of harmonizing labor statutes with statutes in other fields – particularly those which encourage commerce and industrial expansion – presents far more difficult balancing problems. In this age of trade unions with nationwide membership, it is increasingly difficult to remember that without the clear protections erected by the Congress in Norris-LaGuardia, the RLA, and the National Labor Relations Act, 29 U.S.C. §§ 151-187, the right to organize, the right to bargain collectively, and the right to strike in the United States were simply untenable propositions.

The preamble to Norris-LaGuardia recognized this problem in stark terms. The statute withdrew jurisdiction from the federal courts to enjoin labor disputes in the realization that:

> under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, *the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment* * * *.

29 U.S.C. § 102 (emphasis added).

Moreover, the Supreme Court has recently recognized the fundamental importance of Norris-LaGuardia in

terms of the viability of the labor movement:

> The Norris-LaGuardia Act . . . expresses a basic policy against the injunction of activities of labor unions.
>
> * * *
>
> The congressional debates over the Norris-LaGuardia Act disclose that the Act's sponsors were convinced that the extraordinary step of divesting federal courts of equitable jurisdiction was necessary to remedy an extraordinary problem.
>
> * * *
>
> The Norris-LaGuardia Act responded directly to the * * * pattern of injunctions entered by federal judges. "The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction."

Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees, 481 U.S. ____, 107 S.Ct. 1841, 1846-47 (1987) (citations omitted).

Finally, experience shows that as the protections of labor statutes are diluted, even under the "neutral" terms of deregulatory actions by Congress, the economic power of employees is visibly diminished by both contracting the authority of their representatives to bargain on their behalf and by reducing the ranks of their organized membership.

With this in mind, we turn to the task of exploring the interplay between the ICA, the RLA, and Norris-LaGuardia.

Under the ICA, Congress sought to provide the ICC with the means to prevent labor strife by assuring "fair wages and working conditions in the railroad industry." 49 U.S.C. § 10101a(12). To accomplish this important *but limited aim*, Congress provided the ICC superseding authority to supervise and implement labor protective conditions in terms of acquisitions, sales, and abandonments of railroad lines. But it did so only insofar as this authority is necessary to "assure fair wages and working conditions" in order to ensure the free flow of commerce. In these narrow circumstances, the ICA supersedes the authority of the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping process designed to reach labor protective agreements. Were it otherwise, the ICC's authority in this area, and specifically its recent deregulatory actions, would be largely nullified. However, the ICA does not so easily supersede Norris-LaGuardia for, except where Congress has *specifically exempted the ICA from the operation of other laws and required mandatory labor protective conditions*, nowhere in the ICA is there any indication of its direct incompatibility with the anti-injunction statute. Clearly, Norris-LaGuardia says nothing about the methods by which labor protective agreements are made, but rather represents a completely independent *and very clear* decision by Congress to insulate labor disputes from the injunctive powers of the federal courts.

Our decision in *Missouri Pacific Ry. v. United Transp. Union*, 782 F.2d 107 (8th Cir. 1986) (per curiam), *cert. denied*, ____ U.S. ____, 107 S.Ct. 3209 (1987), when read in conjunction with *Railway Labor Executives' Ass'n v. Staten Island R.R.*, 792 F.2d 7 and *Railway Labor Executives' Ass'n v. Pittsburgh & Lake*

Erie R.R., 831 F.2d 1231 illustrates implicitly the interaction of these three federal statutes.

In *Missouri Pacific*, we held that when a consolidation transaction subject to 49 U.S.C. §§ 11341, 11347, statutory provisions which specifically *exempt carriers from all other law*[5] and *require mandatory employee protective conditions*[6], neither the RLA nor Norris-LaGuardia could operate to restrict the terms of the ICA. In the *Staten Island* case, the Second Circuit found, in a transaction governed by 49 U.S.C. § 10905 (similar to the transaction here in controversy), there was jurisdiction under the RLA in terms of the bargaining relationship between the railroads and the unions. However, the court found that the ICA's action approving the transaction withdrew from the courts the power under the RLA to "formulate a meaningful remedy without impinging on the ICC's order approving the sale

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[5] 49 U.S.C. § 11341(a) provides:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. • • • A carrier, corporation, or person participating in [an] approved or exempted transaction is exempt from all other law, including State and municipal law, as necessary to let that person carry out the transaction. • • •

"[T]his subchapter" refers to Subchapter III of Chapter 113 of the ICA, §§ 11341-51, under which the transaction in *Missouri Pacific* was approved, and not 49 U.S.C. § 10901, Subchapter I of Chapter 109 of the Act, applicable here.

[6] 49 U.S.C. § 11347 provides:

> When a carrier is involved in a transaction for which approval is sought under [the consolidation provisions] of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement • • • protective of the interest of employees who are affected by the transaction • • •.

in question."[7] 792 F.2d at 12, *see also United Transp. Union v. Burlington Northern R.R.*, 672 F. Supp. 1579, 1582-83. They thus dismissed the case under Fed. R. Civ. P. 12(b)(6).[8]

Finally, in the *Pittsburgh & Lake Erie* case, the Third Circuit, with a transaction identical to the one before us, faced a request by an employer railroad to accommodate Norris-LaGuardia to the ICA. The court refused to do so, recognizing both the overriding importance of Norris-LaGuardia and finding no irreconcilability between the ICC's authority over the bargaining process and Norris-LaGuardia's prohibition against injunctions. Specifically, the court stated:

> [None of the provisions] relied on by P & LE which makes the ICC's authority "exclusive" with respect to combinations of carriers, contains any language which would suggest Congress intended to override the anti-injunction policy of section 4 of the Norris-LaGuardia Act by the Interstate Commerce Act. * * * Neither the ICC nor P & LE have pointed to any language in the legislative history of any of the labor laws or the Interstate Commerce Act which suggests that the strong national policy embodied in the Norris-LaGuardia Act is to be subordinated to the ICC's authority to approve an acquisition of railroad property.

831 F.2d at 1235-36.

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[7] In *Staten Island*, the viability of Norris-LaGuardia in terms of the ICA was not at issue.

[8] In *Railway Labor Executives' Ass'n* v. *Pittsburgh & Lake Erie R.R.*, No. 87-3797, slip op. (3d Cir. April 8, 1988), the Third Circuit in a carefully crafted opinon by Judge Becker, recently found that the ICC's action in Ex Parte No. 392 did not preempt the RLA.

Thus, the interplay of these three statutes can be summed up as follows. When the ICA provides a specific exemption from all other law and mandates inescapable employee protective conditions under provisions such as 49 U.S.C. §§ 11341(a), 11347, it effectively supersedes both the RLA and Norris-LaGuardia. If there is no exemption and specific protection is not mandated, the authority of the ICA only extends to the bargaining process concerning wages and working conditions. In these circumstances, while the bargaining provisions of the RLA are superseded, Norris-LaGuardia is unaffected and remains to protect the employees' interests.[9]

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[9] In *United Transp. Union v. Burlington Northern R.R.*, 672 F. Supp. 1579, the United States District Court for the District of Montana came to exactly this conclusion. This court, like ours, relying on *Staten Island*, found that mandatory bargaining provisions of the RLA were superseded by the terms of the ICA. However, the court, citing *Pittsburgh & Lake Erie*, found that the ICC's action did not affect the viability of Norris-LaGuardia. Specifically, the court stated:

> Both parties have brought to the attention of the court an opinion handed down by the Third Circuit on October 26, 1987, where the court reversed a district court decision enjoining a labor strike. The Third Circuit found that Section 4 of Norris-LaGuardia need not be accommodated to the Interstate Commerce Act. *Railway Labor Executives' Association v. Pittsburgh & Lake Erie R.R. Co.*, 831 F.2d 1231 (3d Cir. 1987).
>
> The case involved facts very similar to those in the instant case. The Railroad was selling its rail lines to a new non-carrier entity which filed for, and received, an exemption pursuant to section 10505 of the ICA. The union filed section 6 notices pursuant to the RLA and the railroad refused to negotiate. However, there the union chose to strike. Section 4 of the Norris-LaGuardia Act forbids federal district court injunctions against labor strikes. 29 U.S.C. § 104.
>
> *A strike by union members against their employer does not directly contradict or encroach upon the authority of the ICC.*

Moreover, this notion of the viability of Norris-LaGuardia in the face of the supersedure of the RLA is clearly in line with what Congress intended. In examining the impetus behind the recent deregulatory efforts in the railroad industry, Congress has sought to free the union-management relationship from time-consuming, "process oriented" bureaucracy imposed by various regulatory statutes and to allow the sagacious invisible hand of the free market economy to reorder rapidly that industry's economic difficulties. Thus, while we agree with BN's contention that enforcing the mandatory bargaining provisions of the RLA might render the changes in the ICA without much practical force, we find, like the Third Circuit, no inherent incompatibility between these actions and Norris-LaGuardia. Clearly implicit in the congressional vision of a vigorous free market is the realization that all major participants in the economy must be left free to exercise their economic strength and thus return the economy to its natural order. We thus find it impossible to believe that Congress would leave the railroads free to exercise their economic power to advance their goals, yet forbid the unions to use their strength to protect the interests of their membership.

In the end, should Congress wish to accommodate Norris-LaGuardia to the ICC in this situation, it can do

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The authorization of the sale still stands, and at the same time the employees have the right to pressure the employer to negotiate labor protections. The case is distinguishable in that an injunction of the sale would itself directly contradict and infringe upon the authority of the ICC. Congress has given full authority over sales and acquisitions of railroads to the ICC pursuant to the ICA.

672 F. Supp. at 1582-82 n. 3 (emphasis added).

so explicitly. Such a decision concerning such a significant change in federal labor policy is too important to be found implicitly by a court in the interstices of a federal statutory scheme.

IV. *Conclusion*

In its decision in *Ex Parte No. 392*, the ICC has acted, within its authority by exempting, as a class, sales to new carriers from the requirement of imposing labor protective conditions. Moreover, the ICC's authority to supervise and implement labor protective conditions in terms of sales, acquisitions, and abandonments by railway carriers insofar as this authority is necessary to "assure fair wages and working conditions" supersedes the authority of the mandatory bargaining provisions of the RLA. We thus dismiss BN's claim under the RLA.[10] However, we find no inherent incompatibility between the recent deregulatory efforts of the Congress and the ICC and the continued viability of Norris-LaGuardia in the circumstances presented here. We thus affirm the decision of the district court declining to issue an injunction against the proposed strike by the UTU and dis-

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[10] We would alternatively dismiss BN's claim under the RLA on the merits. BN maintains that a strike by the UTU should be enjoined because the UTU did not invoke the major dispute resolution procedures of the RLA and thus must exhaust their remedies before they can strike. The UTU did, however, attempt to do so by serving a Section 6 notice, but was frustrated in this effort by an arbitration award holding that, under the applicable collective bargaining agreements, the Union had no right to serve such a notice before April 1, 1988. We believe the operative fact here is that BN itself changed the status quo without serving a Section 6 notice and would thus be barred from seeking injunctive relief by its own omission.

solve the temporary injunction put in place pending this appeal.

FAEG, Circuit Judge, dissenting.

The district court denied BN's motion for a preliminary injunction against UTU's threatened strike, disclaiming jurisdiction to enjoin the strike on account of the Norris-LaGuardia Act (NLGA). *See* 29 U.S.C. § 104. I do not share the district court's view that injunctive relief is unavailable to protect an ICA order from disruption by a union strike that in essence challenges the terms of that order.

The court correctly observes that when the NLGA and the ICA overlap, they "must be accommodated and harmonized." *Ante* at 10. This accommodation is necessary because neither statute "may meaningfully be read in isolation * * * for they are in fact, an integrated plan of railroad regulation. And if, as is frequently the case in such undertakings, there be overlappings, '[w]e must determine * * * how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.'" *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330, 352 (1960) (quoting *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 806 (1945)) (Whittaker, J., dissenting).

There is no dispute the ICC has discretionary authority to impose labor protective conditions in this type of transaction. *See* 49 U.S.C. § 10901(c)(1)(A)(ii); *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231, 1235 (3d Cir. 1987); *Winter v. ICC*, 828 F.2d 1320, 1323 (8th Cir. 1987). It is also clear the ICC has the power to grant or deny UTU's pending request

for those conditions, *ante* at 4, and UTU will have access to judicial review of an adverse decision, *see* 28 U.S.C. § 2321(a). Simply stated, Congress has charged the ICC with the responsibility to impose protective labor conditions that are "necessary in the public interest" in section 10901 transactions. 49 U.S.C. § 10901(c)(1)(A)(ii).

The court holds, however, that when labor protective conditions are discretionary rather than mandatory, the ICA cannot displace the NLGA's antiinjunction provisions because that situation presents no "direct incompatibility" between the NLGA and the ICA. *Ante* at 13. I believe the court and the Third Circuit have drawn an illusory distinction between mandatory and discretionary conditions. *See Railway Labor Executives' Ass'n*, 831 F.2d at 1334-37. This approach to the issue has led the court mistakenly to conclude the district court was correct in deciding it was without jurisdiction to enjoin the UTU strike, and it is at this point that I respectfully part company with the court.

What is really involved in this case is this: whether UTU, displeased with ICC approval of BN's sale of a section of its rail lines to MRL, may bypass the ICC and direct its displeasure at BN for the singular purpose of extracting concessions that are at odds with the terms of the ICC order. I think not, and I believe my view is at the heart of the decision in *Missouri Pacific Railroad v. United Transportation Union*, 782 F.2d 107 (8th Cir. 1986) (per curiam), *cert. denied*, 107 S. Ct. 3209 (1987) (*MoPac*). In adopting the district court's decision permitting the injunction, the court in *MoPac* stated:

> [A]llowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend

> that affected employees have such power to block consolidations which are in the public interest. • • • [I]t is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired.

Id. at 112.

It is apparent a UTU strike here would be aimed at obtaining the essential equivalent of the same labor protective conditions UTU is actively seeking from the ICC. I am persuaded that in these circumstances, just as in cases in which protective conditions are mandatory, the NLGA cannot be used to thwart an ICC order approving the BN-MRL transaction. When viewed from this perspective the potential conflict, while undoubtedly relating to BN' relationship with its employees, does not bear the characteristics of an NLGA section 104 labor dispute. I believe Congress, through the ICA, has granted the ICC authority (subject to judicial review) to resolve conclusively the issues UTU seeks to raise by way of the threatened strike.

In sum, the UTU strike threat amounts to an unacceptable neutralization of congressional policy in favor of the ICC's exercise of expert authority to serve the public interest in the area of railroad service. I believe the provisions of the ICA embody the greater interest when a dispute involving a railroad and its employees has been triggered by an order of the ICC. In these circumstances, the competing aspects of the ICA and the NLGA should have been resolved by the district court in favor of the ICA. Thus, I would reverse the district

court's order disclaiming jurisdiction to consider BN's injunction request.

A true copy.

Atttest:

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In the Supreme Court of the United States

OCTOBER TERM, 1988

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY, ET AL., PETITIONERS

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL., CROSS-PETITIONERS

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

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No. 88-1706

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY, ET AL., PETITIONERS

v.

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ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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1. The Chicago & North Western Transportation Company (C&NW) and the FRVR Corporation (FRVR) are, respectively, the seller and purchaser of a rail line. The Interstate Commerce Commission (ICC) authorized their transaction, pursuant to the Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*, through the ICC's "*Ex parte*

No. 392" procedures.[1] Shortly thereafter, C&NW and FRVR filed a petition with the ICC seeking a declaratory order "clarifying" the ICC's jurisdiction over labor issues arising from the transaction, including whether its authorization of the transaction "displaces" the collective bargaining provisions of the Railway Labor Act, 45 U.S.C. 151 *et seq.*, and the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. 101 *et seq.* (Pet. 3). The Railway Labor Executives' Association (RLEA), which represents various railway labor interests, opposed the petition.

The ICC issued a decision essentially declaring that the Interstate Commerce Act preempts the provisions of the Railway Labor Act and the Norris-LaGuardia Act to the extent necessary to allow the parties to consummate an ICC-authorized transaction. Pet. App. 4a-23a. See *id.* at 14a-17a, 18a. The RLEA then sought judicial review of the ICC's order in the court of appeals pursuant to the Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* (also known as the Hobbs Act). The United States, which is a statutory respondent in such cases (see 28 U.S.C. 2344, 2348), filed a statement indicating that it neither supported nor opposed the ICC order under review.

The court of appeals held that "it is for this Court, not the Commission, to decide whether the Railway Labor Act and the Norris-LaGuardia Act must be accommodated to the authority of the Commission under

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[1] See *Ex parte No. 392 (Sub. No. 1)—Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1985), aff'd *sub nom. Illinois Commerce Comm'n* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987).

section 10901 of the Interstate Commerce Act" (Pet. App. 2a-3a). The court explained that it had recently issued a decision holding that "while the Railway Labor Act must be accommodated" to the ICC's authority to impose labor protective conditions, "there is 'no inherent incompatibility' between the recent deregulatory efforts of Congress and the ICC and the continued viability of the Norris-LaGuardia Act" (*id.* at 2a). See *Burlington Northern R.R.* v. *United Transp. Union*, 848 F.2d 856 (8th Cir.), cert. denied, 109 S. Ct. 499 (1988). The court of appeals accordingly affirmed the ICC's decision, but only to the extent that the decision was consistent with the court's prior opinion. See Pet. App. 2a-3a, 24a-25a.

2. C&NW and FRVR petition this Court for a writ of certiorari to review the court of appeals' ruling that the ICC's authorization of a rail line acquisition does not relieve the courts of the provisions of the Norris-LaGuardia Act prohibiting injunctions in cases involving labor disputes. Their petition presents a question that is identical to the question presented in *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n*, No. 87-1589 (argued Mar. 29, 1989). We accordingly submit that the petition and RLEA's related cross-petition should be held and disposed of in light of this Court's resolution of *Pittsburgh & Lake Erie R.R.*, *supra*.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JUNE 1989

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